

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

RYAN K.,

Claimant,

vs.

REGIONAL CENTER OF THE EAST BAY,

Service Agency.

OAH No. N 2006080133

DECISION

Administrative Law Judge Cheryl R. Tompkin, State of California, Office of Administrative Hearings, heard this matter on September 7, 2006, in Oakland, California.

Pamela Higgins, Fair Hearing and Mediation Specialist, represented the service agency, Regional Center of the East Bay (RCEB).

Claimant Ryan K. was represented by his parents Claudia and Tony K.

The matter was submitted for decision on September 7, 2006.

ISSUES

(1) Whether RCEB should be required to reimburse the cost of Relationship Development Intervention (RDI) training and services purchased by claimant's parents prior to claimant being found eligible for regional center services.

(2) Whether RCEB should be required to fund RDI services for claimant.

FACTUAL FINDINGS

1. Claimant was born December 7, 1996, and is 9 years old. He has been diagnosed with Asperger's Syndrome, Attention Deficit Hyperactivity Disorder (ADHD), Obsessive-Compulsive Disorder (OCD), Depression, not otherwise specified (NOS), and Oppositional-Defiant Disorder symptoms. Claimant lives with his mother, father, younger brother and aunt in Hayward, California.

2. Claimant has a history of behavioral and social difficulties that were noticeable in preschool and have persisted. In preschool he had little social interest in other children and had difficulty following directions and participating in groups. Although claimant had a large vocabulary, he had difficulty making his wants and needs known, which resulted in increased frustration and behavioral problems by claimant. Due to his behavioral problems, in kindergarten claimant was referred for a private psychological evaluation. He was found to have significantly elevated scores on measures of oppositional behavior, inattention and hyperactivity. He was diagnosed with ADHD, with oppositional features, and placed on medication.

Claimant's parents subsequently sought behavioral assistance and counseling services through the agency Through the Looking Glass. In early January 2003, following an assessment, claimant was diagnosed with Asperger's Syndrome and ADHD, hyperactive-impulsive type. It was felt that claimant's oppositional behavior was a result of his Asperger's disorder. A follow-up language evaluation at Cal State Hayward in July 2003 found above average expressive and receptive skills and moderately impaired pragmatics or social language skills.

3. In August 2003 claimant's parents applied for RCEB services under the diagnosis of Asperger's Disorder, but claimant was found ineligible for due to his superior cognitive and academic skills. Claimant's parents did not appeal the RCEB decision denying eligibility.

4. In July 2004 claimant was assessed for receipt of RDI services by Creative Learning Center, and was found to be a good candidate for services. Claimant began an RDI program with the Creative Learning Center and continued ongoing RDI support for about four months following his assessment. Claimant's parents were unable to continue the RDI consultation/support due to the cost of therapy, but continued to do RDI in the home without the direction of a consultant.

Due to increasing behavior problems, obsessive-compulsive behaviors and difficulties with appropriate school placement, claimant was again assessed in December 2004, this time by Children's Health Council. The purpose of the assessment was to determine whether claimant's primary educational obstacle was Asperger's, ADHD or Oppositional Defiant Disorder. In this assessment claimant was formally diagnosed with "Asperger's Disorder, ADHD-Hyperactive-Impulsive Type, Expressive Language Disorder, OCD, Depression,

NOS, rule out Oppositional-Defiant Disorder and rule out Written Expression.” An educational plan was subsequently developed for claimant by the school district based upon this diagnosis. Under the district’s educational plan, claimant’s teachers were encouraged to use RDI techniques (indirect prompting, facial expression, gesture and declarative language) during interactions with claimant.

In August 2005, claimant was again assessed by Creative Learning Center, which found that claimant had made some progress, but that he continued to need intensive interventions. Creative Learning Center recommended that claimant begin an RDI program with RDI consultation/support.

5. In November 2005 claimant’s parents again applied for RCEB services for claimant. Claimant’s parents requested that RCEB pay for RDI services if he was found eligible as an RCEB client. According to claimant’s parents, they have seen significant improvement in claimant’s ability to respond to non-verbal cues and his willingness to comply with their requests since they began using RDI. Although they have used other treatment methods in the past, claimant’s parents feel that RDI has been the most effective in addressing claimant’s social development needs. They note that even the education plan for the school district recommends use of RDI techniques, which they contend supports the validity of the RDI program.

6. After reviewing claimant’s records, interviewing his parents and teachers, and observing claimant at school, the RCEB Assessment Team, concluded that claimant was substantially disabled with significant impairments in self-care, self-direction and ability to learn. Effective February 23, 2006, claimant was found eligible for regional center services on the basis of the fifth category criteria (Asperger’s Disorder with substantial functional disability).

7. An Individual Program Plan (IPP) was created for claimant. The IPP, dated March 24, 2006, notes that “the request for RDI exceeds current RCEB policy standards: case manager will review the request with RCEB supervisor and notify I.D. team within 15 days.” On April 5, 2006, claimant’s case manager sent an e-mail to claimant’s parents asking for additional information regarding the RDI program and how it would benefit claimant. She also inquired whether a request for RDI services had been made to the school district.

8. On June 9, 2006, claimant’s case manager received an e-mail requesting that RCEB reimburse the cost of RDI training for claimant’s parents. On June 23, 2006, RCEB denied the request stating,

We believe that RDI is an experimental therapy with no research to support it and we are obligated by the Lanterman Act to take into account the effectiveness of these options. Specifically, section 4512(b) of the Lanterman Act states that “the determination [of services and supports] shall be made on the basis of the needs and preferences of the consumer, or when appropriate, the consumer’s family, and shall include consideration of a range of service options

proposed by individual program plan participants, the effectiveness of each option in meeting the goals stated in the individual program plan, and the cost-effectiveness of each option.”

In addition, section 4648(a)(8) of the Lanterman Act states, “regional center funds may not be used to supplant the budget of an agency which has a legal responsibility to serve all members of the general public and is receiving public funds for providing those services.” In this case, it appears [claimant’s] educational program may not be adequate. Your request may be more appropriately directed to his school district since his educational needs are the responsibility of Hayward Unified School District.

9. Claimant’s parents appealed RCEB’s denial of their request for reimbursement. At hearing, the parties jointly requested that the Administrative Law Judge also determine whether RDI is experimental and whether RCEB should be required to fund RDI services.

10. RDI is a relational based treatment program for autistic spectrum disorders. It was developed and trademarked by clinical psychologist Steven Gutsein, Ph.D. The focus of RDI is to teach parents and others how to motivate and enable those with autism to experience social relationships through social and emotional development activities. RDI is designed to improve an autistic child’s ability to interact spontaneously with others, to read and react to the emotions of others and to develop a natural intellectual curiosity. It is not a comprehensive behavior modification treatment modality for autistic children.

11. Weihe Huang, Ph.D., a board certified behavioral psychologist, is employed by RCEB as a behavioral analyst. Dr. Huang testified that the National Research Council currently recognizes several treatment modalities for working on the behavior and social skills of children on the autism spectrum: the Behavioral Approach (Applied Behavior Analysis (ABA) training or Pivotal Response training) which is the most widely accepted approach, the Relationship-based Developmental Approach, and TEACCH (Treatment and Education of Autistic and Related Communication-Handicapped Children). RCEB is willing to fund recognized intervention(s) that are reasonably calculated to produce lasting, meaningful benefits for a consumer (i.e., interventions that have withstood scientific testing). RDI is not a recognized intervention or treatment modality, and is still considered experimental by the scientific community.¹

Dr. Huang explained that a treatment modality is considered experimental until there is clear evidence of the effectiveness of the treatment. The initial step in proving the effectiveness of a treatment is publication of studies regarding the effectiveness of the treatment in a peer

¹ Paul Fujita, M.D., a staff physician for RCEB, is board certified in pediatrics, with a subspecialty in developmental and behavioral pediatrics. Dr. Fujita similarly opined that there is currently insufficient scientific evidence or proof to consider RDI an effective treatment program.

review journal such as Journal of Autism and Developmental Disorders (JADD). The studies or experiments supporting the effectiveness of the treatment modality must have controls that can rule out other explanations of a possible outcome and demonstrate that a certain treatment model is responsible for the outcome. The studies must also be replicated by independent researchers to avoid the possibility of bias and to demonstrate that the treatment modality is effective for more than one researcher. Dr. Huang also explained that although parent observations are important and can provide helpful information, they are not generally accepted as proof of the effectiveness of a treatment modality because the observations are subjective and subject to the placebo effect (i.e., often the parents will feel there is progress simply because the child is receiving treatment).

12. In 2003, Dr. Gutstein issued a pre-publication research manuscript entitled: “The Effectiveness of Relationship Development Intervention to Remediate Experience-Sharing Deficits of Autism-Spectrum Children.” To date, neither Gutstein’s manuscript² nor any other study establishing the effectiveness of RDI has been published in a peer review journal. Nor have controlled studies of the RDI program been conducted. Dr. Gutstein, conducted a retrospective study in which he compared a group of individuals who had received RDI services with a group of individuals who had not receive RDI services. Because Gutstein’s study was retrospective, there was no way to be sure that RDI was the only service received by the RDI group, or that RDI was responsible for the outcome. There have been no studies by independent researchers of the RDI treatment program. The RDI treatment program therefore fails to meet the accepted scientific standard for an effective treatment program. Because RDI lacks scientific evidence to support its usefulness in treating autistic spectrum disorders, children using the program run various risks, including slowing the child’s progress, wasting time precious to a child’s development and learning, harm to the child, and wasting financial resources.

13. On its website the Association for Science in Autism Treatment (ASAT)³ notes that RDI has not been evaluated in peer-reviewed studies with strong experimental design, and urges professionals to present the RDI program as untested and to encourage families who are considering this intervention to evaluate it carefully.

14. Pursuant to RCEB Purchase of Services Procedure # 7400, services may only be authorized if identification of the purchased service is a result of the IPP process, where the ID team has met/discussed the need and has identified all potential options to meet the need. The

² Although Dr. Gutstein announced on his website that his pre-publication research manuscript had been accepted by JADD and would appear in the journal sometime in 2005, no such publication has occurred.

³ ASAT was founded in 1998 by parents and professionals dedicated to improving the lives of people with autism. It advocates for science-based information and effective services. Its mission is to disseminate accurate, scientifically sound information about autism and treatment for autism and to improve access to effective, science-based treatment for all people with autism.

need must be clearly documented in the consumer's IPP and supported by information in the data base and case management notes. The services must also be purchased from an authorized vendor.

RCEB Purchase of Service Policy # 3404.1 authorizes purchase of intensive behavioral/social skills services when a child's/adolescent's IPP identifies the need for the development of positive behavioral and social skills, and, among other things, the IPP includes a family support plan where the provision of this service is a necessary support to strengthen the family capacity and enhance intervention skills of family members.

RCEB Purchase of Services Policy # 3423, which covers the purchase of therapies, provides, "Services that are described as therapeutic but are experimental in nature and have no proven outcomes are not included in this policy."

15. Both Dr. Huang and Dr. Fujita testified that claimant's case is complex because he has multiple diagnoses and therefore he needs a comprehensive, integrated treatment approach. Both doctors feel that the first step in determining a treatment approach is for RCEB to conduct a comprehensive assessment of claimant to determine all of claimant's needs. They do not believe that providing RDI, which focuses only on social development, will adequately address claimant's needs, and since RDI is experimental, RCEB will not fund this treatment. Drs. Huang and Fujita recommend that after the assessment the ID team meet with the RCEB Autism Clinical Assessment Team to get recommendations regarding alternatives to RDI treatment. RCEB is willing to provide behavioral intervention and has vendored providers who can provide this service. Some of the vendored providers use relational based intervention techniques similar to those used in RDI and RCEB is willing to assist claimant's parents in identifying such providers. Since claimant's case is complex, his treatment will likely involve multiple agencies, including the school district. RCEB is willing to provide advocacy in dealing with other agencies as well. RCEB asserts that it is willing to work with claimant's family to meet his needs.

LEGAL CONCLUSIONS

1. Under the Lanterman Developmental Disabilities Service Act (Lanterman Act) (Welf. & Inst. Code, § 4500 et seq.),⁴ the State of California accepts responsibility for persons with developmental disabilities (§ 4501) and pays for the majority of their "treatment and habilitation services and supports" in order to enable such persons to live in the least restrictive environment possible (§ 4502, subd. (a)). The State agency charged with implementing the Lanterman Act is the Department of Developmental Services (DDS). The Lanterman Act authorizes DDS to contract with regional centers to provide developmentally disabled individuals with access to the services and supports best suited to them throughout their lifetime. (§ 4620.)

⁴ All citations are to the Welfare and Institutions Code unless otherwise indicated.

2. In order to determine how an individual client is to be served, regional centers are directed to conduct a planning process that results in an individual program plan (IPP) designed to promote as normal a life as possible. (§ 4646; *Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 389.) The IPP is developed by an interdisciplinary team and must include participation by the client and/or his or her representative. The ID team must determine which services and supports are necessary for the consumer and must reflect those needs in the IPP. (§ 4512, subd. (b).) Among other things, the IPP must set forth goals and objectives for the client, contain provisions for the acquisition of services (which must be provided based upon the client's developmental needs), and reflect the client's particular desires and preferences. (§ 4646; § 4646.5, subds. (a)(1), (a)(2) & (a)(4); § 4512, subd. (b); § 4648, subd. (a)(6)(E).) Services and supports available to persons with developmental disabilities include behavior training, behavior modification programs and social skills training. (§ 4512, subd. (b).) Regional centers are also directed to give very high priority to development and expansion of services designed to assist families caring for developmentally disabled children at home. Assistance is defined to include behavior modification programs and advocacy to assist persons in securing educational services and other benefits to which they are entitled. (§ 4685, subd. (c)(1).)

3. Although an IPP must reflect the needs and preferences of the consumer (§ 4512, subd. (b)), a regional center is not mandated to provide all the services a consumer may require. A regional center's provision of services to consumers and their families must "reflect the cost-effective use of public resources." (§ 4646, subd. (a).) A regional center also has discretion in determining which services it should purchase to best accomplish all or any part of a consumer's IPP. (§ 4648.) This entails a review of a consumer's needs, progress and circumstances, as well as consideration of a regional center's service policies, resources and professional judgment as to how the IPP can best be implemented. (§§ 4646, 4648, 4624, 4630, subd. (b), & 4651; and see *Williams v. Macomber* (1990) 226 Cal.App.3d 225, 233.)

4. Claimant's parents request that they be reimbursed for RDI training and services purchased prior to claimant being found eligible for regional center services. Their request must be denied. Under the Lanterman Act the services and supports to be provided to a consumer must be determined through the IPP process. That process requires ID team members to meet and agree on the services to be provided. If no agreement is reached, the consumer or his/her representative may request a fair hearing. In this case there was no ID team, no ID team meeting, no ID team agreement for purchase of services and no IPP. At the time claimant's parents purchased the RDI services claimant had been found ineligible for RCEB services. Claimant's parents did not appeal that determination, and any claim of entitlement to RCEB services prior to claimant's current eligibility date of February 23, 2006,

is time barred. (Welf. & Inst. Code, §§ 4710.5 & 4712.5.) Claimant's parents are therefore not entitled to reimbursement for RDI training and services purchased prior to claimant being found eligible for regional center services.

5. Claimant's parents also request that RCEB be required to prospectively fund RDI services for claimant. This request too must be denied. While the Lanterman Act authorizes regional centers to provide behavior training, behavior modification programs and social skills training, nothing in the Act requires that RDI be the treatment modality. Section 4648 gives a regional center discretion in determining which services it should purchase to best accomplish the objectives of an IPP, and section 4512, subdivision (b) requires a regional center to consider the effectiveness of each service option in meeting IPP goals. RDI is an essentially untested, experimental program that fails to meet the prevailing scientific standard for an effective treatment method. The regional center determined that it would not fund RDI because there was no scientific evidence it would be effective in meeting claimant's needs or the goals of his IPP. It is found that RCEB acted reasonably, and in a manner consistent with the provisions of the Lanterman Act, when it declined to fund RDI, an experimental treatment.

RCEB's decision not to fund a treatment method that is not evidence-based (i.e., does not use procedures that have been carefully studied and the results reviewed and published) is also consistent with the statement of legislative intent set forth in section 4501. That section provides:

The Legislature finds that the mere existence or delivery of services and supports is, in itself, insufficient evidence of program effectiveness. It is the intent of the Legislature that agencies serving persons with developmental disabilities shall produce evidence that their services have resulted in consumer or family empowerment and in more independent, productive, and normal lives for the persons served.

6. Although claimant failed to establish an entitlement to RDI services, it is clear from the evidence presented at hearing that claimant requires behavior intervention and/or social skills training, and that his parents require assistance in securing those services. It would therefore appear appropriate that an interdisciplinary team meeting be held to explore alternate providers and/or services to address claimant's needs. Claimant's parents are encouraged to request such a meeting, as is their right under the Lanterman Act. (Welf. & Inst. Code, § 4646.5, subd. (b).)

ORDER

1. Claimant's request that RCEB reimburse his parents for RDI training and services purchased prior to claimant being found eligible for regional center services is denied.

2. Claimant's request that RCEB fund RDI services for claimant is denied.

DATED: _____

CHERYL R. TOMPKIN
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision; both parties are bound by this decision.
Either party may appeal this decision to a court of competent jurisdiction within 90 days.